

Dec. 5th 1759.

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MEMORIAL

FOR

Lord *Kaims* and the Trustees of *Robert Glendinning*, and other Creditors on the Estate of *Langton*;

AGAINST

The Trustees for the Creditors of *Provost Brown*, and other Creditors on the said Estate.

IN the Ranking of the Creditors of *Langton*, an *interim* Report has been made by the Accomptant, whereby it appears, that there falls to be drawn by real Creditors, preferable to the Adjudgers, the Sum of 69,762 *l.* 9 *s.* 7 *d.* *Sterling*; and there remains of the common Fund to be drawn by the Adjudgers, the Sum of 6346 *l.* 8 *s.* 5 *d.* which is to be divided among the Adjudgers, whose Debts extend to 20,871 *l.* 19 *s.* 6 *d.*

Several of the adjudging Creditors had inhibited the common Debtor before the Contraction of other Creditors Debts, or the Dates of their heritable Securities. The inhibiting Debts amount to upwards of 13,000 *l.* *Sterling*, and the Sum of the Debts and Securities struck at by the Inhibitions, is 85,360 *l.* 15 *s.* 10 *d.* *Sterling*, of which 14,871 *l.* 3 *s.* 6 *d.* are Debts secured by Adjudications, and the remaining Debts are secured by Infeftment.

It was alledged by the adjudging Creditors, That the Sums to be drawn by the Inhibitors in virtue of their Inhibitions, ought to be allocated proportionally among the whole Debts that are struck at by their Diligence.

Jan. 13th,
1747.

That this is the Rule universally observed in all Cases where a preferable Creditor has it in his Power to draw his Payment, to the Prejudice of any one or more Creditors posterior to him in Preference: And this proportional Allocation was also universally observed in the Case of Inhibitions from the earliest Time that Rankings have been known in this Country, down to the Year 1747, when a different Interlocutor was pronounced in the Case of the Creditors of *Elliot of Whithaugh*.

On the other Hand it was contended for the Creditors infest, who are struck at by the Inhibitions, that the Inhibitors whole Draught ought to be laid upon the adjudging Creditors; or, where their Shares are not sufficient, upon the latest Infestments subject to the Inhibition, in Terms of the Decision in the Case of *Whithaugh*.

The Lord *Shewalton* Ordinary has taken the Debate to report, and appointed Parties to give in Informations.

The Memorialists are hopeful, that upon a thorough Consideration of the Case, it will appear to your Lordships, that the Rule which was immemorially observed in all Rankings down to the Case of *Whithaugh*, is unavoidably founded in the established Principles of Law, and the Nature of the Diligence: And also that there occurs the highest Equity why it should not be departed from in the present Case.

And as the chief Colour that our Competitors draw to their Side of the Argument, arises from misrepresenting the Nature of this Diligence of Inhibition, it is proper that it should in the first Place be considered: It is described in the Law Books to be a legal Order prohibiting the Debtor to alien, and the Lieges to accept any Right from him till the Creditor be satisfied, *Stair, Lib. 4. Tit. 56. Sect. 4.* The Effect of it is plainly no other than to set aside every Deed that is done contrary



trary to the Prohibition, so as the Debtor may be ranked upon any Diligence he may use to affect the Lands, in the same Manner as if none of these Deeds had existed.

It is apparent, that this Diligence is in nothing similar to an *Infeftment*, which makes a *real Right*, and consequently affords the Creditor a *Preference* upon the Lands in *suo ordine*: A Reduction *ex capite inhibitionis* gives no Preference. It resembles most nearly a Reduction upon the Act 1621, both calculated to prevent the Debtor alienating to the Prejudice of the Pursuer, but not giving him any real Right until he establish it by other Diligence. If indeed an Adjudication is led by the Inhibiter, he thereby acquires a real Right, which may take Place even before a prior real Right, after that prior one is reduced *ex capite inhibitionis*: And if there is but one real Right in the Field, which is subsequent to the Inhibition, the Inhibiter's Adjudication will draw the whole, which has the same Effect as if he had the preferable Right: But in every other Case it will lead to Error and Confusion, to consider *Inhibition* as giving any *Preference*; as such is not truly the Nature of the Diligence, tho' it may happen *per accidens* to have the same Effect in a singular Case.

For Instance, if there are but two Annualrenters in the Field, the first of which only is struck at by the Inhibition: If the Inhibiter is ranked *primo loco*, and thereafter the Annualrenters in their Order, a palpable Absurdity will follow, from supposing the Inhibiter preferable, *viz.* That the first Annualrenter, tho' struck at by the Inhibition, draws his full Debt, and yet the second Annualrenter, who is not struck at, will be cut out, if the Fund is insufficient for Payment of the whole: And the like Absurdity will still appear more glaring, if we suppose a greater Number of competing Rights, whereof some are prior, and others posterior to the Inhibition.

To prevent this Absurdity, and to give the proper Effect to the several competing Rights and Diligences, it is obvious, that the real Rights affecting the Lands must be ranked

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ed in the first Place, and allowed to draw according to their Dates, which will give these real Rights their full Operation. And after that, it falls next to be considered, what personal Claims or Demands may lie against any of these real Creditors, whether upon the Head of *Inhibition*, or of *Consent*, or of the *Act 1621*, and to give these Claims or Demands their proper Effect: For Example, an *Inhibition*, tho' not a real Right to afford a *Poinding* of the Ground, or any other Consequence of a real Right, affords, however, a Claim or Demand against those who obtained real Rights from the Debtor after he was inhibited. This is truly of the Nature of a Claim for Damages, obliging these real Creditors to make up to the Inhibiter what he suffers by their Preference: In this Manner all Rankings are managed, and in this Manner only, can Justice be done to all concerned.

The Question then comes in what Manner these Damages are to be ascertained or proportioned among the several Creditors struck at by this Diligence; Whether it is to affect them in the Order of the *Dates* of the *Contractions*, or in the Order of the *Dates* of the *Infestments*, or to affect the whole *equally* and *proportionally*?

Observ. I. And here it is first to be observed, that every one of the Debts contracted and Securities granted, subsequent to the *Inhibition*, are equally liable to the Reduction. The first *Contraction* is totally liable to be reduced as well as the last, or if the last Contractor obtain the first *Infestment*, this will as little secure him against a total Reduction: The Law forbids the Leiges from dealing with the Debtor, or accepting of any Right from him, until he do Justice to the Complainer. This is evident, *first*, From the immemorial Stile of the Diligence: The Debtor is expressly prohibited and discharged 'to make any private or publick Alienation of his Lands, Heritages, &c. or any Part thereof.' He is also prohibited

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‘ to contract Debt, or do any other Deed directly or indirectly, whereby *any* of the said Lands may be apprised, &c. in Prejudice of the Complainer:’ And on the other Hand, the whole Leiges are discharged ‘ To block, buy, take or accept *any Right* from him of his Lands, &c. or accept from him any Bonds, Obligations or Contracts, whereby *any Part* of the same may be apprised, adjudged or any ways evicted, &c.

Here the Prohibition is in the clearest Terms unlimited, discharging every Sort of Alienation great or small, and every Sort of Contraction, because every such Deed must prejudice the Inhibitor, by lessening his Fund of Payment: So from the very best Authority, the old unvaried Stile of the Diligence, it appears evidently to be the Purpose of it, to forbid all Deeds that may in any Degree render the Creditor less secure of his Payment. It is no Defence to one who contracts *spreto mandato*, That he only took Right to a Part of the Debtor’s Estate, and left remaining with him as much as would, upon a Computation, be found sufficient for the Creditor’s Payment: The Fund must be left untouched, as it was at the Date of the Diligence, else the Deed falls under the Prohibition, and of Consequence under the Sanction of the Law.

And accordingly it was never doubted in any Period of our Law, That such was the Nature and Effect of this Diligence, that if a Debtor aliens any Part of his Lands after Inhibition, it is competent to the Inhibitor to reduce the Deed of Alienation, and adjudge the Subject as still belonging to his Debtor, without being obliged to prove or say, that he is in any Hazard of losing his Debt: That it was never thought any Defence against this Reduction, that the Debtor remained solvent, and can pay his Debts: That such has been the Construction of this Diligence from the Beginning, is proved by the best Authority: Sir Thomas

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Craig

Craig mentions a Decision with Approbation, where a Reduction *ex capite inhibitionis* was sustained, where the Debtor continued solvent, and was abundantly able to satisfy the Inhibitor. The Reduction was at the Instance of the Countess of Crawford, against the Laird of Garthland, for reducing a Deed granted to him by her Debtor whom she had inhibited. *Nam licet aliunde debitor erat idoneus facultatibus & solvendo; alienationem tamen in dictum Dominum factam rescindendam censuit Senatus: Æquius enim putavit, ut qui contra prohibitionem judicis alienationem in se recepit, de evictione contra alienantem ageret, quam ut creditor, quem judex sua auctoritate muniavit, dubias lites sequi cogeretur, et in credito meram patiatur.* Craig, Lb. 1. Dieg. 12. § 31.

The Antiquity of this Decision must add Weight to its Authority, as it fixes in early Times the Nature of the Diligence, and that upon the most solid Principles: For if a Creditor were under a Necessity of prosecuting a doubtful Litigation, with respect to the Circumstances of his Debtor, before recovering Payment of his Debt, it is plain this Diligence must prove a very precarious, imperfect Remedy. The remaining Fund, tho' in Appearance at present sufficient, may, for ought the Inhibitor can foresee, be swept away by Adjudications and personal Bonds existing before his Diligence. Nay, if it were untouched at the Time of the Competition, yet it is still liable to be evicted by some latent Claim: At any rate, were the Diligence restricted to this limited Effect, it must render every such Reduction an expensive and laborious Process. If previous Inquiries were necessary to be made into the Sufficiency of the Debtor's Effects, and the Extent of his Debts at the Time of every Alienation he had made in Contempt of the Law, a Creditor would rather chuse any other Method of recovering his Debt, than by involving himself into dark and intricate Compts and Reckonings, which could not be brought to a Period without much Expence and Trouble.

And this Judgment given by the Wisdom of our Ancestors, which,

which, after weighing the Inconveniencies on both Sides, turned the Scale in Favour of the *Creditor* against the wilful *Contemner* of the *Law*, has been invariably followed ever since. Lord *Durie* observes a Case, *November 27th 1630, Douglas contra Johnston*, where *Douglas* having insisted in a Reduction of a Comprising led by *Johnston* on a Bond subsequent to his Inhibition, it was alledged for *Johnston*, 'That the Pursuer ' could not reduce *in totum* the whole Comprising, seeing the ' Lands were worth more than would pay the Parties whole ' Debts.' But this Alledgeance was repelled, and the Pursuer was found ' to have good Action to reduce the Bond, and all ' that had followed thereupon, *in totum*, ay and while he was ' paid of his Debt.'

And indeed there is hardly a Decreet of Ranking that has been at any Time pronounced by the Court, but will bear Testimony to the Observance of this Rule, if an Inhibition has at all occurred in it. For the constant Tenor of your Lordships Decrees *ex capite inhibitionis*, is to reduce every Deed subsequent to the Diligence, without Distinction, whether *prior* or *posterior* among themselves, to this Effect, *That the Inhibitor may draw such Share of the Fund as he would have drawn, if none of these Debts or Deeds had existed.* No Reduction was ever qualified, so as to affect the *last Deed* only, or the several Deeds challenged, in order as they should be found *latest* or *least preferable*: And therefore the Memorialists have the utmost Authority that the Nature of the Thing can admit of, that this Diligence operates a total Reduction of every posterior Deed without Distinction: That every one of them, whether earlier or later, is in Law considered as done in prejudice of the Complainer, and equally liable to be set aside as *spreto mandato*.

And as the Deeds granted subsequent to Inhibition are all equally struck at by it, and subject to a total Reduction on that Ground; so it is a Rule equally established, and incontestible, That whatever a Party struck at by this Diligence, is obliged

Observ. II.

to repay to the Inhibitor out of the Sums he stood ranked for by his Infestment, he can have no Recourse against Creditors afterwards infest, who are not subject to the same Diligence. He has got the full Effect of his Infestment when he was once ranked on the Land for his whole Sum, and cannot recur against the posterior Annualrenters for Relief of a Sum drawn from him upon a *Defect* in his own *Right*. This Rule is clearly laid down by Lord *Stair*, Lib. 4. Tit. 35. *Competition*, § 29. ‘ If any of the Competitors had used *Inhibition* against any others, in that Case they would draw out of the Share of these whom they could reduce, so much as to make up the Share they would have had, if that reducible Right did not exist: And yet that reducible Right, albeit prior to the other Right, could not recur upon them, to make up what the *Reduction* had carried from it in favours of the reducing Right; because the Ground of Reduction is always upon the Fault or Defect of the Right reduced. As in the present Case, a Right reducible *ex capite inhibitionis* is faulty and defective, as proceeding against the King’s Authority, prohibiting to take any such Right, and therefore it cannot claim to be made up out of any other Right which is not faulty; which holds in the other Grounds of Reduction, as being in *curfu diligentie*, &c.’

And accordingly your Lordships have always determined this Point, when ever it occurred: *First*, In the Competition of *Langton* and Sir *James Cockburn*’s Creditors, observed by Lord *Stair*, Title, *Competition*, § 27; and thereafter in the Ranking of the Creditors of Sir *Thomas* and Sir *William Nicolson*s. And not many Years ago, the same Question was again brought in Dispute, and determined in the same Manner in the Ranking of the Creditors of *Belsches* of *Tofts*, observed in the *Dictionary*, Page 184, February 1730, *Campbell* contra *Drummond*.

Observ. III. In the third Place, It is a Consequence of these Observations, and a Rule that has been universally hitherto received, That

That where an Inhibition strikes against several Purchases or several Annualrent Rights, affecting different Parts of the same Debtor's Estate, the Effect of the Inhibition is allocated equally and proportionally upon the several Lands, or heritable Debts which are liable to be challenged by it. Tho' the Dispositions and Bonds are granted of different Dates, and the Infeftments are also taken upon them at different Times, yet it has never hitherto been thought, that the earliest was to have a Preference to the latest upon that Ground. The *prior* Inhibition is a Diligence upon which the *whole subsequent Rights* granted by the Debtor, are subject to a *total Reduction*. And as it is equally competent to the Inhibitor to insist against one or other of them, the only Distribution that can be made by the Law of this common Danger, to which they are all liable, is to make them concur *pro rata* in relieving themselves from it.

And accordingly wherever an Inhibiter has insisted to draw his Debt out of any one Subject liable to his Diligence, he has always been obliged to assign his Diligence to the Defender upon Payment, that he might recur upon his Assignment for a *Proportion* of the Debt, against the other Tenements, subject to the Inhibition. This proceeds upon the same Ground, that a Creditor having a *catholick Infeftment* of *Annualrent* or in *Security* over several Tenements, when he attacks one of them for his Debt, and recovers the whole from the Purchaser, is obliged to assign to him his Infeftment, that he may *recur* for a *Proportion* against the other Tenements. These things are established by the Law and Practice of this Country, uniformly laid down in the Law Books, confirmed by the Decisions of the Court, and never departed from at any Time, nor are they disputed on the Part of our Competitors.

And therefore the Question is reduced to a very narrow Compass, whether the Burden of an inhibiting Debt, which if it struck at Dispositions or Securities granted over different Tenements, behoved to be laid *pro rata* upon the several Tenements, without Regard to the *Dates* of the *Dispositions* or the *heritable Bonds*, or to the *Dates* of the *Infeftments* taken upon them,

Application
to the present
Point.

them, whether the same proportional Allocation ought to take Place, where the Inhibition strikes against several *Annualrent Rights*, or other *Securities* or *Diligences*, affecting the same Tenement?

It is not easy to discover a solid Ground of Difference betwixt the two Cases, that which is *admitted*, and that which is here *disputed*: For, whether the Rights granted by the common Debtor affect the same, or different Tenements, they are still, *quoad* the Inhibiter, distinct and separate Rights from one another, each of them subject to a separate Reduction at his Instance, who may draw his Sum out of any one of them he pleases; and therefore *quoad* all of them, he is precisely in the Case of a *catholick Creditor*, who has it in his Power to draw the whole of his Debt from different Parties; and if he draws it from one of them, is in Law obliged to assign to him, that he may operate a proportional Relief against the other.

Did the Rule of Law stand as our Competitors plead, that the whole Burden of the *Inhibition* must come upon the *last Infesment*, this behoved also to extend to the Case where different Subjects are affected, whether by an *Inhibition*, or by a prior *catholick Infesment*; for there is still a *Priority* and *Posteriority* among the Parties affecting them; they do not all acquire or infest in one Day. But this would be to overturn every Principle that has been hitherto received in determining the Competition of Creditors, and according to which the Rights of the Subjects of this Country have been uniformly decided, as far back as any Competitions have been known, or any Rules established for deciding them. It was never heard of in any Instance, that the *last Purchaser* of a Tenement affected with a *catholick Infesment*, was to be burdened with a higher Proportion than the Party who made the *first Purchase* of another Part of the same Subject; or that any Difference was made betwixt several Purchasers who dealt with the common Debtor, after being interpellated

terpelled by Inhibition: They are all considered as in *pari casu*; they equally saw the Danger arising from the catholick Infestment or Diligence, antecedent to their Bargain, and must equally contribute to relieve one another from the Consequences of it.

And as it neither is, nor can be disputed, that a Creditor taking Infestment of Annualrent from the common Debitor, after Inhibition in the Tenement *A*, must pay his Proportion of the Inhibiter's Debt, along with another Annualrenter, who at any Time after gets Infestment in the Tenement *B*; it must appear very incongruous to suppose that the proportional Allocation should be excluded, because the Creditors had got both Tenements comprehended under their Infestments.

And as there is truly no Difference in the Principles of Precedents. Law, betwixt these Cases admitted to be *established*, and the Case now *disputed*; so, as far back as Rankings of Creditors have been known in this Country, down to the Case of *Whitebaugh*, the same Rule was uniformly observed in ranking Creditors, who, after *Inhibition*, obtained *Infestments*, whether upon the *same*, or *different Subjects* belonging to the common Debitor.

The Ranking of the Creditors of Sir *William* and Sir *Thomas Nicolson* of that ilk, was one of the first considerable Rankings which came to a Conclusion after the Statute 1681: In it there occurred a great Number of Inhibitions, and the various Effects and Operations they might have with respect to other Creditors, were in this Ranking most distinctly ascertained and determined; among others, the Point now disputed is clearly decided, first, by an Interlocutor, Page 1446 of that Decreet, which is taken into the grand Decerniture, Page 575, in these Words:

The Lords find, That when the Inhibitors, after they have drawn their Share as Ajudgers, that they recur against the Infesters, of Annualrent, or Ajudgers, whose Bonds are granted after

after executing of the Inhibition, and have Right and Preference to draw out a Share of the reducible Rights, PROPORTIONALLY to make up the Share they would have had, if that reducible Right did not exist, or had been no Burden upon the Estate. And find, That the REDUCIBLE RIGHT, albeit PRIOR to the other Rights, CANNOT RECUR upon them, to make up what the Reduction shall carry from them, in Favour of the reducing Right.

After this Ranking was finished, the Creditors applied to the Court for Rules and Instructions to be given to the Accountant, to direct him with respect to the Division of the Price; and most distinct Rules were laid down, in strict Conformity to the Principles and Analogy of Law, in which, amongst other Points, that, now called in Question, was in the clearest Manner settled and ascertained; particularly the 4th Rule directs, *That the Sums contracted after one of the Inhibitions, must be stated; That PROPORTIONALLY, AND AT SO MUCH PER CENT. they may make up the Inhibiter's Loss, and Prejudice he sustains, by the contracting of their Debts.*

And after the 13th Rule, particular Directions are laid down for the Operation of the Calcul with respect to Inhibitions, by which it is declared, that the Sums due to Infesters of Annualrent, upon Bonds anterior to the Inhibitions, must be subtracted from the Sums they draw, as Infesters of Annualrent; 'and the remaining Sums (drawn for Debts subsequent to the Inhibition) must only be stated to bear a proportional Burthen of the Inhibiter's Sum.'

And by another Article of these Directions it is declared, *That the Sum the Inhibiter drew as a common Adjudger, must be subtracted from the Sum he drew in Computation with the anterior Creditors, and the Superplus only must be stated, PROPORTIONALLY cast on at so much per cent. upon all the posterior Creditors Adjudgers, and the INFESTERS OF ANNUALRENT, in so far as they were not salved by their Adjudications effeiring to their Sums.*

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These Rules were exactly followed in the Scheme of Division; and the Sums drawn by the *Inhibitors*, in Virtue of their Inhibitions, which amounted to upwards of 20000*l.* are *proportioned* among the *Annualrenters* and *Adjudgers*, *pro rata* of their several Draughts, directly contrary to what our Competitors insist for, that the whole should be laid upon the Adjudgers, and after their Sums are exhausted, upon the Annualrenters last inest.

And these Rules, which were framed with so much Care and Accuracy in this Ranking of Sir *Thomas Nicolson's* Creditors, were uniformly followed in after Rankings, whenever the *species facti* occurred, to which they applied. It does not very often happen, that an Inhibition strikes against several *Inestments of Annualrent*, preferable to one another upon the same Subject; and without a laborious Search of the Records, which this Case cannot admit of, it cannot be discovered precisely in how many Cases that *species facti* has occurred: But we are able to condescend upon a good many, in which it happened, and where the Point was uniformly determined, according to the above Rule: Particularly in the Ranking of the Creditors of *Hallgreen*, which depended for a great many Years, and had different Schemes drawn out in it by two able Accomptants still alive:--In the Ranking of the Creditors of *Dalmahoy*:--Of the Creditors of *Tanachy*:--Of *Hamilton of Abbay-hill*:--Of Mr. *William Stirling*:--Of *Lindsay of Mains*:--Of *Boswell of Baberton*:--Of *Belsches of Tofts*:--In which last Case, the *preferable Annualrenter*, who paid a large Sum as his Share of the Debt due to the Inhibitor, carried on a Litigation upon other Points, on which he expected to obtain Relief against the Scheme; but he was not advised to make any Objection to it in this Particular, which was agreeable to the uniform and constant Practice.

In all these Cases the same Claim occurred as in this Case, at the Instance of Inhibitors, who recurred upon other Creditors that had obtained *Inestments of Annualrent* after

their Inhibition; and the Inhibiter's Sum was always ranked to be drawn proportionally off the subsequent Annual-renters *pro rata*, without regard to the *Priority* or *Posteriority* of their *Inseiments*. Many other Cases may have occurred, in which there was Occasion for the Application of the same Rule. But it is unnecessary for the Memorialists to be at the Trouble or Expence of searching for these Cases, as it was fairly admitted by our Competitors in their Answers to the Objections given in to the Lord Ordinary, that this proportional Allocation *was the constant Rule of making out all Schemes of Division, till the late Case of Whitehaugh.*

And as that is the Case, the Memorialists in this Question have not only the Principles of Law, but also the invariable Practice of the Court, down to the Year 1747, upon their Side; and there occurs also a strong Ground in Equity to move your Lordships not to recede from that Practice in the present Case, to the Prejudice of the Memorialists.

For your Lordships will know, that as the Ranking of the Creditors of *Langton* has depended ever since the Year 1690, it has happened in the necessary Course of Things, that many of the Debts affecting the Estate have gone about from Hand to Hand, as oft as any of the original Creditors stood in need of their Money, and others could be found who were willing to advance such Sum as it was judged their Debts would be able in the Event to draw out of the Lands: And as all these Transactions were made upon the Footing of the Law as it then stood, that every *Annualrenter* was to bear an *Abatement* of his *Proportion* of the *Inhibiter's Debt*, which was the uniform Rule observed in all Rankings during that Period: The *Assigney* to the *first Annualrent* got Deduction of his *Proportion* of the inhibiting Debt *pro rata*, and the *Assigney* to the latest Annualrent could seek Deduction of no more: It must appear particularly hard, that upon a different Notion, taken up at the Distance of a Tract of Years upon such slender Grounds, as will hereafter appear, the Parties who advanced their

their Money upon Conveyances to the *later Investments*, should be exposed to the *Loss* of their *whole Sums*, in order to give to the *Acquirers* of the *other Rights* an *exorbitant Advantage*, which they had no Expectation of at the Time of their Acquisition.

The Memorialists, before entering upon the Objections urged on the other Side, shall only beg Leave to observe some similar Cases, which may tend to illustrate the Argument: The first is that of an insolvent Debitor, who after Horning or other inchoate Diligence against him by one Creditor, ventures to give Securities to several other Creditors: Such Securities are reducible upon the second Clause of the Act 1621: But it was never found nor pleaded, so far as we know, that the Reduction must be brought against the Security last in Date, or that this Security only ought to bear the Burthen of it: All the Securities are held in law to be in *Defraud* of the more *timely Diligence* of the other Creditor, and are equally subjected to Reduction: And as they are equally liable to be set aside, the Law divides the Burthen proportionally; the Party who first got the partial Security from the Bankrupt, cannot relieve himself totally from the Damage, upon Pretence, that another afterwards followed his Example in the like Transgression.

This is a Case that truly occurs in the present Ranking: There are a good many Securities granted by *Langton* elder and younger, to their favourite Creditors, after *Diligence* by *Horning*, at the Instance of other Creditors. These Securities are all liable to Reduction at the Instance of the Creditor who charged with Horning. It has never yet been doubted, that the Sum to be paid to that Creditor must affect them all equally: And if that Rule must be followed in the Case of such Reductions, it is not easy to discover why a different Rule should be followed in this Case, where the Reduction proceeds upon the same Medium, *viz.* That the Deed is granted *prohibente lege*.

Reductions
on Act
1621.

Another

Another Illustration of the same Principle occurs in the Case of *Consent*. If two heritable Creditors consent to a subsequent Contraction, the Creditor consented to may insist against either of them; but the Relief amongst the Consenters can be by no other Rule but *pro rata*, as it is equally competent to each of them, when pursued, to demand an *Assignment*, which can have no other Result but a *proportional Distribution*: One of the Consenters cannot insist in a total Recourse against the other, in respect that his *Investment* was *prior* and *preferable*: Of that he has got the *full Effect*, when he was *ranked* upon it for his *whole Sum*: What is taken from him upon his own Consent, he must bear an equal Burden of, with others who are liable to the same Challenge: Nor will it make any Variation in the Rule, that the Annualrenters are supposed to have consented at different Times: They are equally connected with the other Creditor by their Consent, and he is not bound to prefer any one of them to the other.

This Case has a great Resemblance to the present: It may be said, without Impropriety, that one who contracts after Inhibition, virtually consents to the Payment of the Inhibiter's Debt: And when a Number of Creditors so contract, the Burden ought to be divided in like Manner as if an express Consent had been given.

And it is upon the same Principles, that where a Number of Cautioners bind for the same Debt at different Times, as they are all equally bound to the Creditor, so any one of them who is sued, whether the latest or the earliest, is, upon making Payment, intitled to a proportional Assignment. So it was determined by your Lordships, December 15th 1722, *Murray of Burghton contra* the Heirs and Creditors of *Orchyardton*, and the Decree was affirmed by the House of Lords.

It remains only to consider the Objections which have been urged on the other Side, in so far as they have not been already obviated.

1mo, It is said ' That the Scope of this prohibitory Dili- Object. 1.
 ' gence is not simply to restrain the Debitor from contracting
 ' Debts, or the Leiges from dealing with him, but only in so
 ' far as a Prejudice may be done to the Inhibiter: That in all
 ' other Respects posterior Creditors fall to be ranked as if there
 ' had been no Inhibition, whereby the Deficiency or Short-
 ' coming of the Fund must fall upon the last or least preferable
 ' Investment of Annualrent.

' And in order to illustrate the qualified Nature of this Di-
 ' ligence, Cases are put where Debts contracted posterior to the
 ' Inhibition may draw a Share of the Price, and yet the Inhi-
 ' biter will draw nothing: *Ex. gr.* If he has neglected to adjudge
 ' within the Year; and the Adjudications led within that Pe-
 ' riod, upon Debts prior to his Diligence, are sufficient to
 ' exhaust the Fund.'

The Fallacy of this Argument lies in misrepresenting the Na- Answer.
 ' ture of this Diligence: The Instances mentioned are just and
 ' true, and many others may be figured in which an Inhibiter
 ' can draw nothing by his Diligence, and yet the Debts struck at
 ' by it may draw a Share. But that can happen upon no other
 ' Ground but one, *viz.* That the Debitor's Estate is wholly ex-
 ' hausted by *Securities* or *Diligences*, which cannot be affected
 ' by the *Inhibition*. In such Case the *Inhibiter* has no *Title* to
 ' challenge any of the subsequent Debts: For the Tenor of eve-
 ' ry Reduction *ex capite inhibitionis* is qualified, as has been al-
 ' ready observed, to this Effect, *That the Inhibiter may draw*
such a Share of the Fund, as he would have drawn if none of
the posterior Debts or Deeds had existed. And therefore, if
 ' the Fund was wholly pre-occupied by prior Creditors, and pre-
 ' ferable Diligence, so as he could take no Share, had the subse-
 ' quent Deeds never been granted, it is plain the *inherent Quality*
 ' of the *Reduction* cannot take place, and the *Inhibiter* can draw
 ' nothing by it; nor is this more than is implied in every Pro-
 ' cess: Process is given to make effectual what the Pursuer is in-
 ' titled to by Law; and if the Pursuer is not intitled to any
 ' E Thing,

Thing, he can have no Process, Were a Reduction, upon whatever Ground, ever so well founded in its own Nature, yet if the Pursuer can draw no Benefit by the Reduction, this must necessarily found a good Objection against his Process.

But where there is, as in this Case, a much greater Share of the Fund unpreoccupied by any prior Creditor than would be sufficient to satisfy the Inhibiter, and which he would have drawn, had it not been for the after Deeds, the Diligence then has its full Force, and that without any Quality or Limitation. It has been already fully proved, that the Import of it is to exclude every Deed, whereby any Part of the Lands, that could have been affected by his Diligence, is evicted from him. That this is what the Law considers as a *Prejudice* done to him, if the Fund of his Payment is anywise lessened or impaired: That it is no Defence that a Sufficiency is left; the Alienation of a Part falls under the Prohibition as well as that of the whole: And were it otherwise held, the Diligence could not have the *Effect* the Law intends for the Benefit of the Creditors.

And therefore the Error of our Competitors Argument is quite apparent: It is true, that the Inhibition can have no Effect, if the whole Fund is preoccupied by Creditors independent of it: But if there remains a Fund unpreoccupied, and a much larger Fund than is necessary, as in this Case, the Inhibition affects the whole and every Part of it, by whichever of the posterior Creditors it is held: And where several Parties concur that are subject to the *same Burden*, it must fall to be allocated by a *proportional Distribution*.

Object. II. ' That as the Inhibiter cannot challenge the Debitor's Deeds, ' further than he can qualify that he sustains a Prejudice thereby, he has no Title or Interest to interfere in the Ranking ' of the other Creditors. The Inhibition secures his Preference, whereby he draws his Payment out of the first and ' readiest of the Fund, and sustains no Prejudice by the first ' Annualrent, if the remaining Fund is sufficient for Payment ' of his Debt.'

But

But every Particular of this Deduction is erroneous, as has been already proved. The Inhibiter needs qualify no other Prejudice to challenge the Debitor's posterior Deeds, but that they affect a Fund which he could have affected if they had not existed: Where there is such Fund as in this Case, he reduces every posterior Deed *in totum*: So it tends only to mislead, to speak of not qualifying a Prejudice in this Case, where he fully qualifies all the Prejudice the Law requires. It is not necessary to qualify that his Payment is disappointed by this or that particular Deed of the Debitor: It is sufficient to say, that they have occupied a Part of the Fund which he could otherwise have taken if they had not existed. This is relevant to reduce the whole *in totum*.

And it is another Error to say, that his Inhibition secures his Preference, whereby he draws his Payment out of the first and readiest of the whole Fund. It has been clearly proved that the *Inhibition* gives no *Preference*. If there are any Deeds prior to the Inhibition, the whole Deeds prior, and posterior, must be ranked in the Order they affect the Lands, in virtue of their Insestments, without Respect to his Diligence; and the Operation of it is merely to redraw his Debt from those who are subject to it. And as he is intitled to *redraw* from every one of them to the *full Extent*, the Loss, of Consequence must be *equally divided*.

‘ That the contrary Rule would be destructive of that Security arising from the Records, upon the Faith of which the Subjects of this Country have Reason to rely, if an Inhibition for any Sum, however small, against the most opulent Estate, should prohibite the Lieges from all Intercourse with the inhibited Person, tho’ his Estate was apparently sufficient to clear both Contractions. And therefore it were absurd, that a Creditor who lent his Money upon an Estate, which, from the Records, he saw liable to no Incumbrance, but an Inhibition for a small Sum, and who had thus secured himself by all the Forms the Law could devise, should nevertheless

‘ nevertheless be prejudged by the after Contractions of other Creditors, or Infeftments granted to them by the Defender.’

Answer.

This Objection proceeds upon the Supposal, that the Creditor who lends his Money after Inhibition, is totally unacquainted with the Nature of the Diligence: And that it is incumbent on the Law to protect him from an Inconvenience that he falls into through his own Blunder and Misapprehension: There is hardly any Body, who ever heard of Diligences or Securities, but knows that one who lends a Sum of Money after Inhibition, can have no Certainty as to his Security, unless he see the Inhibiter either paid or secured. If a Proprietor of an Estate worth 40000 *l.* is inhibited for a small Debt of 1000 *l.* no Man can with Certainty lend him the smallest Sum upon a real Security: If he lends another 1000 *l.* more, and takes Infeftment, he cannot know but another Infeftment may be afterwards taken upon an heritable Bond prior to the Inhibition, for 39000 *l.* In that Case the Inhibiter will evict from him the 1000 *l.* for which he was ranked upon his *Infeftment*, and he can have *no Recourse* against the second Annualrenter, but must *lose* his *whole Debt*.

Again, suppose he could have a Certainty that there was no prior heritable Bond, yet still there may be personal Debts not struck at by the Inhibition, which may by Diligence evict the Remains of the Fund, after the 1000 *l.* drawn by the Annualrenter; and then that Sum will be evicted from him by the Inhibiter: So that he must still lose his whole Debt. Or,

3^{tho}, Let the Supposition be carried yet further, That the Creditor who lends on real Security, after Inhibition, is absolutely certain that the Debtor at that Time owes no Debt at all either real or personal, (which is a Certainty that cannot possibly he had) yet even in that Case, he would not be secure of drawing his Money as long as the inhibiting Debt

Debt subsists uncleared: If the Person inhibited dies, and his Heir gives an heritable Bond, for 39000 *l.* this Bond which is not affected by the Inhibition, with the Infestment for the 1000 *l.* exhausts the whole Estate; and the Infester must pay back the 1000 *l.* he drew, to the Inhibiter, and lose his own Debt.

And therefore, to complain, that no effectual Security can be granted by Infestment after Inhibition, is to complain that the Law stands as it does, or that such a Diligence should have been introduced into the Law: The Inconvenience arises from the Nature of the Diligence, which is calculated to *exclude* every Thing that opposes it, without *preferring* itself: Whoever contracts after such *prohibitory unpreferable* Diligence, if he takes no other Precaution, must run the Hazard of every Accident by which it may be affected: And if it happens to be excluded by other Competitors, he is bound to know that he must be liable to make up the Damage, and to clear the inhibiting Debt, should it exhaust the whole Sum he drew for his own.

And therefore such Creditor who contracts *prohibente lege*, can have no Reason to complain, that a Part of his Security is evicted from him, by the just Effect of a Diligence he saw upon Record and neglected to clear; when by not clearing it, he must know that he was exposed to have the *whole* evicted from him without Remedy.

And the Complaint is the less excusable, that the *Remedy* which was competent to him at the Time was equally obvious, as the *Hazard* he must incur if neglected: The proper Thing he ought to have done, was to see a Part of his Sum applied to clear the Inhibiter's Debt, or to lend a little more Money for that Purpose: Or, if that was not convenient, to give his own Security to the Inhibiter, and include that Sum in his heritable Bond: This is what the Law intends by the Diligence, that there should be no Dealing with the Debi-

tor, till the Complainer be satisfied, and it would be lucky that the Precaution were always observed: It would prevent many unnecessary, intricate and vexatious Disputes. Or,

2do, If the *Annualrenter*, who lends after *Inhibition*, cannot prevail to get the *Inhibiter's Debt* cleared, he should at least take Care to have him *secured by Infeftment* granted to him by the Debitor, after which he will run no Risque from the *Inhibition*: This is the *Annualrenter's* proper Interest yet more than the *Inhibiter's*, as he knows that he may suffer in many Events, through the Defect of the *Inhibiter's Security*, and if he neglects this Precaution, he has himself to blame.

3tio, If the Situation of Parties is such, that no Dealing can be brought about betwixt the Debitor and the inhibiting Creditor, the Debitor cannot in Justice refuse to give the Creditor, who lends him on an heritable Bond, *real Warrandice* against the Effect of the *Inhibition*.

4to, If he refuse this, he declines to give the Creditor a complete Security, whereby the Creditor will be fully justified to issue out *Inhibition* against the Debitor, upon his *personal Warrandice*.

When by all these various Methods, it is so easy for a Creditor, who wants to lend his Money upon *Infeftment*, to secure himself against the Effects of a prior *Inhibition*, if the Lands are sufficient for both: It must appear a very odd Complaint, that is here made by our Competitors, as if the Security of the Records were in Danger, if your Lordships do not overturn this *proportional Allocation*, the Rule which from the Beginning has been established and observed in all *general Burdens* that affect several Parties; or that they should pretend to the Merit of having *secured themselves by all the Forms the Law could devise*, when yet they have neglected every Method, by which it was easy to have attained full Security: And the Complaint is still more extraordinary, that even

even if they should prevail in getting the old Rule set aside in this Case, it could not give them that full Security which they require from a Reliance on the Records: They still incur equal Danger by contracting against this *prohibitory Diligence*, which has no *Preference*, which hurts others without fully securing itself; and there is no other Way to prevent them, but by taking some of the Precautions that have been already pointed out.

‘ That the Creditor last in Order is in *mala fide* to lend
 ‘ his Money, when he sees both the Inhibition and the prior
 ‘ Infestments of Annualrent; and therefore any emergent
 ‘ Loss arising from the Deficiency of the Fund, ought to
 ‘ fall upon the posterior Annualrenters, who had lent their
 ‘ Money with their Eyes open, when from the Records they
 ‘ saw the Lands exhausted by preferable Infestments.’

Answer.

But this Argument, if it had any Force, would conclude against the Rule of Preference our Competitors insist for: They contend that the Burden of the inhibiting Debt should lie upon the *last Infestment*: But by what is here suggested, it ought to lie upon the *last Contractor* tho’ *first infest*: The first Contractor cannot surely be held in *mala fide*, because he did not advert to Debts that were not contracted for Months or Years after: If *A* lends a Debitor, who had been before inhibited, a Sum of Money in the Year 1750, and *B* lends him another Sum, in the Year 1751, and takes Infestment, and afterwards *A* infests or adjudges: It surely cannot be said, that *A* was in *mala fide* in overlooking *B*’s Debt, (suppose it sufficient to exhaust the whole Estate) when it was not contracted for a Year, or perhaps for more Years after: And as little can he be said to be in *mala fide*, for doing Diligence, or taking Security for a Debt, which he had fairly and honestly lent at a Time when the Debitor owed nothing but a Trifle to the Inhibiter.

And indeed it will appear, upon Reflection, that such *mala fides* as is here mentioned, is for the most Part more imputable to the Creditors who are first infest, than to those
 who

who are later. The Case which most commonly happens is, that after Inhibition is taken out by a suspicious, or perhaps a humourfome Creditor, the Debitor still in good Credit contracts personal Debts: In Process of Time, coming to be in labouring Circumstances, he can procure no Money but upon real Security, he grants an heritable Bond for a large Sum, and the Creditor takes Infeftment, after which, the prior Creditors who lent him when in good Credit, press for heritable Bonds of Corroboration, and are also infeft: Here it is apparent, that the Creditor who took the *first Infeftment* when the Debitor was in labouring Circumstances, is the only Creditor to whom a *mala fides* of this Kind can be imputed; and if this Objection were to have any Weight, it is he only who ought to *bear the Burden of the Inhibition*; and yet, by the Plea set up by our Competitors, it is he only who is to be *relieved from the Burden*.

The Order of Infeftments in Priority of Time, is no Doubt the Rule of the Preference that is to be ascertained to the real Right: But it is with Submission absurd to say, that a second Infefter of Annualrent was in *mala fide* from an Infeftment taken the Day before upon a Bond that was granted seven Years after he had lent his Money: And indeed it is improper to talk of *bona* or *mala fides* in such Cases: The Creditors who lend their Money to the Debitor at different Times, can see nothing in the Records but the Inhibition: They know nothing of one another, till after a Tract of Years that they appear in the Ranking with their Infeftments and Adjudications: The latest Diligence may be upon the oldest Debt: This will no Doubt retard him in the Order of Preference: But how it should expose him to be punished as a *mala fide* Dealer, to bear a larger Share of a general Burden than his due Proportion, is not *at all* conceivable.

It was well foreseen by the Wisdom of our Ancestors, that the entering into these cerebrine Notions anent the Conjectures People might form of the Circumstances of their

their Debtors, when they lent their Money, or took their Securities, would land in an endless Perplexity and Confusion; and therefore they did with great Judgment establish a general Rule, that every common Burden should be equally felt by all the Parties affected by it: That a general Distress, to which many are subject, should not be allowed to swallow up any one, to the Benefit of the rest, but divided with an equal Hand among the whole, so as none of them should be overwhelmed by it.

Some other Things were observed upon the Part of our Competitors, which seem less material: It was said, 'That Inhibition was a Diligence merely personal, in Favour of the Inhibiter, which could not be founded on by third Parties: That the Reduction could not hinder the Debtor to use his Infeftment as a Title against any other Party than the Inhibiter, for which two Decisions were referred to; 26th January 1636, Lady Borthwick contra Ker; and 7th January 1680, Hay contra Lady Ballegarno.' We have no Occasion to dispute this Observation, as it does not appear to have the smallest Influence on the present Argument.

It was also said, 'That the several Annualrenters who contract after Inhibition, are not liable to a *total Reductio* on ex capite inhibitionis, but only in so far as the Inhibiter can shew that the Fund of his Payment is exhausted by their Infeftments.'—But the contrary of this has been so fully proved from the best Authorities, and the Reason of the Thing, that it would be improper further to insist upon it.

Our Competitors chief Reliance seemed to be upon the Case of *Whitehaugh*; where it was found, That the Burden of the Inhibiter's Debt was to affect the last or least preferable Annualrent: And it was said, 'That the Practice since that Time had gone upon this Plan.'

But as they have not condescended upon particular Instances; so it is very probable that this *species facti*, which is but rare, has not occurred in any Case where a considerable Sum

depended upon it; otherways it is like, the Parties who were to be Sufferers by the new Rule, would have submitted to your Lordships Review a Point in which the Bench were so narrowly divided in Opinion: And at any Rate, as there has been no after Trial of the Question, the whole Weight of our Competitors Plea lies upon this single Decision.

The Memorialists will alwise have the highest Deference for every Judgment of the Court: But yet they cannot bring themselves to think, that the Variation of a single Decision is of equal Consequence with the Departure from a Rule which had been anciently settled, and inviolably observed, as far back as we have had any Competitions of that Kind; especially when that Rule is so closely connected with the System of our real Preferences, that the Abolition of it may endanger other Parts of the System, which are as yet thought to be well established. If this new Rule shall come to be settled as a fixed Part of the Law, it will soon be argued *ex paritate rationis*, that a catholick Debt is not to be proportionally divided among the Purchasers of the several Tenements; but the Burden of it is to lye wholly upon the last Purchaser; with many other Innovations, which may wholly alter the Plan of our Rankings from what has been hitherto understood: The Hazard of altering any Part of a connected System is like pulling out a Pillar from an old Fabrick, which may endanger the whole. In the present Case, there is no Motive from Equity to lead to it, as the most of our Competitors acquired their Rights at a Time when the Law was understood to be settled in the Manner we now plead; and made their Acquisitions with a View of bearing a Share of the Burden, which they want now to roll over wholly upon the last Infesters and Adjudgers, and by this unforeseen Alteration to extinguish the Draughts that shall fall to their Share.

In respect whereof, &c.

JAMES FERGUSON.

